SUPREME COURT, U. S.

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No. 615

In the Supreme Court of the United States

OCTOBER TERM, 1968

HOUSEHOLD GOODS CARRIERS' BUREAU, ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission jointly move that the judgment of the three-judge district court be affirmed.

STATEMENT

This is an appeal from the judgment of a three-judge district court unanimously sustaining a decision of the Interstate Commerce Commission. The Commission decided that certain operations involving containerized overseas shipment of household goods qualify as "freight forwarding" and thus may law-

fully be carried on without regulation under Part IV of the Interstate Commerce Act and also decided certain related questions.

Appellants are motor carriers of household goods certificated under Part II of the Act. Carriers such as the appellants handle almost all transportation of household goods within the continental United States (J.S. 13a). The goods are loaded onto a van at the point of origin, transported by highway, and unloaded at destination. For many years, the overseas movement of used household goods was also handled primarily by such motor carriers; the goods were loaded onto a van at origin and transported by highway to the carrier's warehouse, reloaded onto a second van for movement to the dock, reloaded again onto the ocean carrier, and finally reloaded onto another van at the overseas dock for movement to the destination (J.S. 14a–15a).

More recently, however, containerization has developed as a competing method of handling overseas shipments of used household goods. The goods are packed in a large container at or near the point of origin, and the container is then transported by regulated motor, rail and ocean carriers to the final destination, eliminating the need to reload the goods in transit (J.S. 2a, 15a–16a). The arrangements for such containerized shipments, for which the Department of Defense is by far the largest customer (J.S. 14a), are generally handled by companies claiming to be free from regulation under the exemption in the Interstate Commerce Act for freight forwarders of used household goods (49 U.S.C. 1002(b)).

Whether or not the activities of the companies arranging containerized shipments of household goods

are legal thus depends on whether or not such companies qualify as "freight forwarders." Section 402(a)(5) of the Act (49 U.S.C. 1002(a)(5)) defines a "freight forwarder" as a common carrier of property (other than a carrier subject to Parts I–III of the Act) which "(A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to [Part I, II, or III of the Act]."

Because a single freight forwarder rarely has by itself sufficient traffic in overseas shipments of household goods, coincident in time and place, to enable it to make up a full carload lot, a practice has developed whereby two or more freight forwarders combine their shipments onto the same truck or car and thereby obtain the more favorable full carload rate (J.S. 3a, 16a–17a). Such combining of shipments of two or more forwarders is referred to as "joint loading" (J.S. 3a, 17a, n. 3). The arrangements for the line-haul movement and joint loading are frequently handled by traffic management companies acting as agents for large numbers of forwarders (*ibid.*).

In this proceeding the Commission considered for the first time whether these operations and practices associated with containerized shipments of household goods qualify as activities of a "freight forwarder"

under the Act.[1] First, the Commission held that the statutory requirement of consolidation (see Section 402(a)(5), *supra*) is satisfied by joint loading, in which the shipments of several forwarders are combined, as well as by the combining of the shipments of a single forwarder (J.S. 22a–25a). Second, the Commission held that consolidation qualifies under Section 402(a)(5) if it is effected at a port or outside the country; the statute does not require transportation of the consolidated shipments within the United States, but only that a portion of the through movement before or after consolidation take place within the United States (J.S. 22a, 26a–27a).

The Commission observed, however, that "in some few instances" forwarders engaged in these operations, "are no more than names and * * * all, or nearly all forwarding functions are being performed by traffic management companies" (J.S. 27a–28a). In an effort to correct such conditions, the Commission enumerated certain criteria as guides to the relationships between forwarders and their agents (J.S. 28a–30a) consistent with the statutory exemption. It declined to issue cease-and-desist orders against specific forwarders and found no need to issue a declaratory order with respect to the legality of particular agency practices (J.S. 47a).

Finally, the Commission held that certain local motor carrier operations on behalf of such freight

[1] The case involves three related proceedings—an investigation instituted on the Commission's motion, a complaint, and a petition for a declaratory order—heard together on a consolidated record (J.S. 11a).

forwarders, previously assumed to be exempt from Commission regulation, are in fact subject to the certificate requirements of the Interstate Commerce Act (J.S. 34a–42a). These operations involve pickup and delivery of goods before and after containerization. The Commission noted that, as a result of its ruling, as many as 600 carriers may be obliged to file applications for authority to continue their operations, thereby imposing a heavy burden on the Commission as well as on the carriers (J.S. 42a–43a). In these circumstances, the Commission announced that applications by motor carriers seeking to continue their prior localized operations would be handled, "insofar as possible," on the basis of documentary presentations, and that oral hearings would be held only where "in the judgment of the Commission * * * [they] will assist materially in reaching a prompt and fair decision" (J.S. 45a).

The district court sustained the Commission's interpretation of the statute (J.S. 3a–5a) and held that the Commission's articulation of forwarder-agent guidelines was an adequate disposition of the consolidated proceedings before it. The court rejected as premature (J.S. 6a–7a) appellants' attack upon the Commission's announced intention to process some local motor carrier certificate applications without oral hearings, noting that not one final application had yet been acted upon, that interested parties "may file protests and assert their right to a full oral hearing," and that "such hearings may still be held in the judgment of the Commission" (J.S. 8a–9a).

ARGUMENT

The contentions advanced here by appellants (carriers who compete with freight forwarders) were considered and rejected by the Commission and by the court below. The decision of the district court is correct and should be affirmed.

1. There is no language in section 402(a)(5) of the Interstate Commerce Act requiring that a freight forwarder's consolidations of shipments involve two or more shipments of his own. (J.S. 4a).[2]

A single forwarder rarely has sufficient traffic at any one time to permit him to effect consolidation of shipments originating in his own service (J.S. 3a), the result in large part of the Department of Defense policy of allotting shipments on a rotation basis (J.S. 14a). The interpretation advocated by the appellants would result either in depriving the shipping public of the advantages of the containerized service offered by the forwarders, or, if the forwarders continued to handle the traffic, in unnecessary delays in transportation, with each forwarder compelled to hold shipments until they could be combined for the same destination. "There is nothing in the language of the

[2] The legislative history relied upon by appellants (J.S. 7–11) does not require a different conclusion. While some form of joint loading was evidently employed by forwarders when Part IV was enacted in 1942 (see 49 U.S.C. 1004(d)), the practice of joint loading in connection with containerized shipments is a relatively recent development. At most, the cited legislative history indicates that Congress did not specifically consider the issue presented here. The court below properly accorded great weight to the Commission's interpretation of the statute it administers and declined to interfere with that interpretation "in the absence of compelling reasons" (J.S. 3a).

statute to compel such a result" (J.S. 4a), and the Commission's interpretation has an entirely "reasonable basis in law," *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131.

2. Appellants further claim that the statute requires transportation of the consolidated shipment within the United States and, therefore, that statutory consolidation may not be effected at ports or outside the country. As the Commission noted (J.S. 26a), however, "the definition of a freight forwarder does not require that the operations described as essential for forwarder status be performed within the United States, only that they be performed." The Act encompasses all forwarders conducting interstate or foreign operations "insofar as such transportation takes place within the United States" (49 U.S.C. 1002(a)(6)(C)), and this has consistently been construed by the Commission as embracing forwarders who perform any part of the through transportation service within the United States.[3] Cf. *Porter Co.* v. *Central Vermont R. Co.*, 366 U.S. 272, 274–275. In the challenged instances here, the forwarders perform the assembly movement to the port within the United States, and consolidation occurs either at the port or aboard ship. This is sufficient to bring the forwarding operations within the scope of the statute.

3. The Commission plainly acted within its discre-

[3] As the court below noted (J.S. 5a), the Commission has regularly asserted jurisdiction over forwarders where one or more of the four necessary operations of freight forwarding (*i.e.*, assembly, consolidation, break-bulk, and distribution) have occurred outside the United States. See, *e.g.*, the cases cited by the court below (J.S. 5a).

tion in choice of remedy by setting forth guidelines for future forwarder-agent relationships while declining to issue a declaratory order or cease-and-desist orders against individual carriers.[4] As the court said, "in substance the relief [sought by the petition for declaratory order] has been granted" by issuance of the guidelines, which removed "[a]ny earlier uncertainty which might have existed"; and "since cease and desist orders operate prospectively compliance with the new guidelines would render any such orders moot" (J.S. 7a). The court thus correctly held that issuance of the guidelines "was an adequate disposition of not only the Commission's investigation but of the other two consolidated proceedings as well" (*ibid.*).[5]

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[4] The Commission explicitly noted that the operations "were conducted under a color of right; few appropriate guidelines have existed heretofore; there are infirmities in the record respecting the scope of the commodities transported; and it would not be possible to here issue affirmative orders directed to a significant number of the persons now known be engaged in [these] operations" (J.S. 47a).

[5] The cases cited by appellants (J.S. 15) are inapposite. In *Freight Forwarders Institute* v. *United States*, 263 F. Supp. 460 (S.D. N.Y.), the court held the Commission had erred in failing to decide whether a non-regulated shipper association may engage in joint loading of its trailers, where the association in question indicated it intended to continue the practice (263 F. Supp. at 466–467). In *Akers Motor Lines, Inc.* v. *United States*, 286 F. Supp. 213 (W.D. N.C.), the Commission construed a motor carrier certificate as authorizing certain operations but declined, for insubstantial reasons, to decide whether the inadvertent issuance of the certificate had illegally enlarged the scope of the carrier's authority. In the case at bar, the Commission did not ignore the problem of forwarder-agent relations but dealt with it effectively by issuing guidelines designed to resolve prevailing uncertainty on the matter.

4. Finally, the court below properly held that the appellants' broadside challenge to the Commission's procedures for handling of individual applications which may be filed by local motor carriers was premature. The Commission has done no more than announce its intention to consider such applications, to the greatest extent possible, upon the basis of written representations. The propriety of an agency's denial of an oral hearing in particular cases where there are no material issues of fact in dispute is well established (*e.g., Motor Convoy, Inc.* v. *United States,* 235 F. Supp. 250 (N.D. Ga.), affirmed *per curiam,* 381 U.S. 436). The Commission has stated that hearings will be held where they "will assist materially in reaching a prompt and fair decision" (J.S. 45a), and any refusal to conduct a hearing in a particular case will be subject to judicial review.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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